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Survey Plans, Copyright and Government Process

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Ownership of Copyright

Copyright at common law no longer exists in Canada (since 1921) but this subject is governed by the provisions of the *Copyright Act*, R.S.C. 1970, c. 55. The definition of copyright is found in section 3:

> s.3(1)For the purpose of this *Act*, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture, to deliver the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; . . .

Plans prepared by surveyors fall within the definition of "artistic work":

> s.1(1)"Artistic work" includes paintings, drawings, *maps, charts*, plans, photographs, engravings, sculptures, works of artistic craftsmanship, and architectural works of art. (Emphasis added).

The copyright in any work is owned by the author of that work (s.12(3)). However, section 12(3) also stipulates that "[W]here the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright." The question then boils down to the nature of the relationship between the surveyor and client. Is it an employee/employer contract of service, or a contract for services? Is the surveyor an employee or an independent contractor?

Robert J. Meisner, O.L.S., writes:

> . . . Elements such as the degree of control by the employer, the place where the service is to be rendered and the obligation on the part of the employee to obey orders of the employer must all be taken into consideration.
>
> It would appear that a Land Surveyor is engaged with little or no direct control by a client in the particulars of the preparation of a plan of survey once a client has requested such a plan. It may be concluded that the relationship between the surveyor and his client is that of an independent contractor, pursuant to a contract for services. Therefore, in the absence of an agreement to the contrary, and except where the work is being prepared for and under specific instructions of the Crown, the copyright in the plan and accompanying reports would subsist in the surveyor. (from *Who Owns the Plan?* Terravue. A publication of the Canadian Council of Land Surveyors, Summer, 1986.)

This analysis seems accurate. It seems clear that conducting the survey under a contract for services makes the surveyor the first owner of the copyright in the plan subsequently produced, unless specifically agreed otherwise.

Some Relevant Cases

The passing of the plan to the client may arguably be interpreted as implying a transfer of the copyright, but this transaction is more likely to be classified by the courts as the granting of a license to use the plan only, while copyright remains with the surveyor. In the 1970 case of *Webb and Knapp (Canada) Ltd. et al.* v. *City of Edmonton*, (1970) 11 D.L.R. (3d) 544 the Supreme Court of Canada considered transfer of copyright versus license to use the plan. A land development corporation spent some $138,000 of its own money developing a proposal for a new civic centre for the City of Edmonton. They had an agreement with the City that if the proposal was accepted a large piece of the land would be made available for the project. If rejected, that proposal (including architectural and other plans) "automatically become the property of the City." The proposal was rejected and Webb and Knapp sued when their plans were used by municipal officials to formulate a replacement project. The development company successfully argued that although the "property" in the plans (the actual paper) did pass to the City, the copyright in them did not. The use of the plans by the City for purposes other than for which they were submitted was held to be an infringement of copyright. The damages awarded were measured as a fair charge for a license to use the plans.

The Association of Ontario Land Surveyors has for some time been concerned with the question of copyright in survey plans and the effect that surveyor/client relationships and practices may have on the surveyor's ownership of the copyright as "author" of the plan. The A.O.L.S. Bulletin (1984/24) contains a procedural guide for surveyors. At page 2 it reads:

> The Copyright Act provides for agreements between employers and employees (surveyor/client) despite the fact of the relationship of an independent contractor. The delivery by a surveyor to his client, of a plan of survey and report, pursuant to his client's instructions, may lead a court to conclude an implied transfer of copyright to the client.
>
> In order to ensure that copyright remains with the surveyor, a contract, in the form included in these Guidelines, should be forwarded from the surveyor to the client at the time of engagement, setting out clearly the fact that copyright in such plan and report would continue to subsist in the surveyor. This contract would also give license to the client to use the plan of survey solely for the purpose for which the plan was requested by the client.

The Association of Ontario Land Surveyors provides for its members a sample contract and recommends use of the universal copyright symbol together with the surveyor's name; e.g. c, N.S.E. West, O.L.S., 1989. In addition they suggest that all plans contain this statement located beneath the universal copyright symbol:

> No person may copy, reproduce, distribute or alter this plan in whole or in part without the written permission of John Smith, O.L.S.

The A.O.L.S. approach is "let's not wait for a judicial interpretation; let's make it very clear at the outset by contract and on our plans what the respective rights of the surveyor and client are." It is not a common practice to do so in the Maritime provinces. In the event of a dispute the courts would be left to decide on the rights and obligations implicit in the surveyor/client relationship. In 1982 the New Brunswick Court of Queen's Bench, Trial Division gave us a hint of what might be expected.

In *ADI Limited* v. *Destein, Hamilton and Leibe* (1982), 41 N.B.R. (2d) 518, infringement of copyright and implied

licensing were considered in the context of architectural plans and specifications. ADI designed a retail store building and were successfully sued by the owner when the building settled. The owner hired another company to do repairs and gave that company the original ADI plans which they reproduced and used in the repair process. ADI sued for infringement of copyright. Stevenson, J., summarized the issue as "whether the reproduction of the ADI drawings by the defendants and the inclusion of those reproductions, the soils report, and the specifications in the tender package amounts to an infringement of copyright, or whether it was done within the scope of an implied license from ADI." In finding no infringements of copyright the court said there is an "implied license arising out of the engagement between an owner and an architect or design engineer." The court relied on *Blair* v. *Osborne and Tompkins* [1971], 2 Q.B. 78, where Lord Denning said:

> . . . the payment for sketch plans includes a permission or consent to use those sketch plans for the purpose for which they were brought into existence . . .

Stevenson, J., was also persuaded by the Supreme Court of New South Wales in *Beck* v. *Montana Constructions Property Ltd.*, (1963), 5 F.L.R. 298. He quoted from the headnote:

> The engagement for reward of a person to produce materials of a nature which is capable of being the subject of copyright implies a permission OR consent OR license in the person making the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement.

I am led by the provisions of the *Copyright Act* and these cases to the conclusion that, assuming copyright in a plan vests in the surveyor, provision of the plan to the client implies a license to use it in the generally accepted manner — financing approval, development approval, registration in the Registry of Deeds. This would include making required copies for these purposes. Also, when a plan is submitted to an official in the normal fashion, that official may use it for the purpose for which it was submitted (see *Webb and Knapp, supra*). In New Brunswick and Nova Scotia the landowner who seeks development approval (subdivision, etc.) is required to submit a number of duplicate plans in various combinations of linen, plastic, and paper (see Provincial Legislation, below). They are not copies, but the copies submitted are forwarded to various government offices including LRIS and the Registry of Deeds. The landowner is required to do this, and knows it is part of the process, as does the surveyor who prepared the plans which are submitted in compliance with the development process. I believe the landowner's license encompasses all of this.

I am, thankfully, not forced to rely solely on my reading of these authorities for the conclusion that once a government official receives a plan it may be used in legitimate government processes.

Provincial Legislation

Planning Legislation

The New Brunswick *Community Planning Act*, R.S.N.B. 1973, c.C-12, and the Nova Scotia *Planning Act* control the planning process in these provinces. In Nova Scotia there are no integrated survey areas. The person seeking subdivision approval is required to submit a number of copies of the plan to the development officer. Upon approval the officer forwards the plan to the Registry for filing. One of the copies is sent to LRIS. Plans are sent to LRIS at the same time as they are sent to the Registry of Deeds. Receiving a copy from the development officer is a mechanism which allows LRIS to react to the plans more quickly. In the absence of this practice a delay would occur, occasioned by microfilming, processing, etc.

In New Brunswick and Nova Scotia copies are not made by the development officer but are required to be submitted by the person seeking approval for use in the normal manner. LRIS reacts to these plans only when they are approved and filed in the Registry (albeit by receipt of a separate copy in Nova Scotia).

Public Records Legislation

Section 1 of the *Public Records Act* (R.S.N.S. 1967, c.253 and R.S.N.B. 1973, c.P-24) of both provinces reads as follows:

> s.1 The books, papers, and records kept by or in the custody of any provincial or municipal officer in pursuance of his duty as such officer are vested in Her Majesty the Queen and her successors.

A literal reading of this section would lead to the conclusion that once the plan was submitted to the development officer (who is a municipal or provincial employee) it becomes the property (is vested in) the Crown. An argument could be made, using *Webb and Knapp, supra*, that although the "property" in the plans vests in the Crown, the copyright does not automatically follow. Nonetheless, in the process outlined above, copies are not made, but are submitted by the landowner, the submission of which implies license to use them (likely including copying) for the purpose for which they were submitted. As well, the Registry of Deeds, various

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Survey Plans *continued*

government departments (Health, Transportation, etc.) and even LRIS are the Crown; one arm of the Crown (development officer) passing a plan, which the legislation indicates is vested in the Crown, to another arm of the Crown for legitimate Crown purposes (public registry system, property mapping) hardly seems open to challenge. As well, LRIS provides maps and attributes files, etc., to those departments involved in the development process, supporting their efforts and increasing their efficiency. This process is all part of legitimate government activity.

The Registry and Evidence Acts

The Nova Scotia *Registry Act* is silent with respect to the provision of copies of registered or filed documents, plans, etc. However, section 11(11) allows the Governor-in-Council to make regulations. Section 2 of the *Costs and Fees Act* provides that the setting of any fees under that Act is a regulation. Schedule A of the *Costs and Fees Act* among other things sets a fee to be charged by a Registrar of Deeds "for supplying copies of recorded or filed documents, plans, etc." Access fees for searching purposes are also prescribed. Therefore, by regulation it can be said the Registrar is empowered to make copies.

Section 12 of the Nova Scotia *Evidence Act* confirms the evidentiary status of certified copies of any "grant, map, plan, report, letter, or official or public document, belonging to or deposited in any department of the Government of Canada, of this Province, or any province of Canada . . ."

Hours of business are stipulated in Nova Scotia by s.7 of the *Registry Act* and s.9 of the *Public Officers Act*. One of the bases of operation of a Registry System is that the recording of a document, etc., puts the public on notice of its existence. The public must therefore have access. Registries of Deeds must be public offices (as the prescribing of hours of business implies), and the documents found in them (including plans) are necessarily public documents.

Conclusions

1. The copyright in survey plans is vested in the surveyor.
2. The provision of plan(s) to the client by the surveyor implies a license to use them, including making copies, in the manner and for the purposes for which they were produced.
3. Submitting a survey plan to the development process passes the property in that plan (arguably the copyright as well) to the Crown. Even if the copyright is retained by the surveyor, the physical plan belongs to the Crown and a license is implied for it to be used in the generally accepted manner which includes filing in the Registry of Deeds and forwarding to LRIS. Submission of any plan directly to LRIS would similarly result in it becoming Crown property, or at the least imply a license for LRIS to use it.
4. A plan filed in the Registry of Deeds is a public document open to public view and a copy of which may be obtained by the public.

— Rosalind C. Penfound

Quieting Titles *continued*

— any other person having an interest has not, during that time, (1) received any benefit, (2) paid any expense, or (3) exercised any proprietary right

The affidavit is critical because there is no judgment by default under the Act. Even if added defendants fail to file, this element of evidence under s.11(2) must be satisfied. Include another pre-hearing memorandum with your application noting anything unusual and summarizing where in your affidavits the required proofs are located.

In Conclusion

These checklists emphasize the important ingredients of the action and are not intended to be exhaustive. May all your applications be quiet. *Mea culpa.*

— A. Lawrence Graham

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